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ABSTRACT

As of the fall of 1984, 40 states had by state mandate adopted some form of student minimum competency testing; 19 are or will be using test performance for the award of high school diplomas. In the other 10 states, local initiatives had implemented such testing programs on the school district level. Five states were using competency tests to determine grade-to-grade promotion. The primary challenges presented to date to determine the award of high school diplomas were filed as a result of the Florida Educational Accountability Act of 1976. Significant litigation concerning minimum competency testing of students has presented two primary sets of equal protection claims--those put forth on behalf of black students and those on behalf of "every student." Due process challenges to the use of competency tests and cases concerning handicapped students enrolled in special education programs have also arisen. In 36 states, some form of teacher competency testing has been mandated and all 14 of the other states are considering the addition of teacher competency test requirements. Litigation can be expected with equal protection and civil rights challenges. (MLF)

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Minimum Competency Testing: A Review of the Case Law

Diana Pullin

During the past five years, state and federal courts have become involved in legal decisions heavily interwoven with thorny education and public policy implications when they have decided cases involving minimum competency testing. However, unlike the situation in so many of the school law cases in the recent past which have addressed the complex interplay between legal, educational, and political issues in the context of civil rights claims, student challenges to minimum competency tests have involved claims not only on behalf of members of protected minority groups, but also on behalf of all public school students. While most of these lawsuits have addressed the implications of the use of minimum competency testing to make critical determinations about students such as the award of high school diplomas or the determination of class placement, a new series of these lawsuits can be expected to challenge the use of minimum competency tests to make critical decisions about teachers and other educational personnel.

As of the fall of 1984, forty states had by state mandate adopted some form of student minimum competency testing; in the other ten states, local initiatives had implemented such testing programs on the school district level. Five states were using competency tests to determine grade-to-grade promotion. Nineteen of the forty states engaged in minimum competency testing are either currently using, or will in the next six years use, student test performance to determine either the award of a high school diploma or the type of high school diploma awarded.¹ In thirty-six states, some form of teacher competency testing has been mandated and all fourteen of the other states are considering the addition of teacher competency test requirements.²

1. Education Law Center, Education Commission of the States Clearinghouse Update (July 1984), Pipho & Hadley, State Activity: Minimum Competency Testing.

2. Education Law Center, Education Commission of the States, Working Paper LEC-84-6 (Oct. 1984), Lines, Teacher Competency Testing: A Review of Legal Considerations.

While the total number of state and federal court decisions concerning the use of student competency testing has been small, the impact of those decisions has been significant. The landmark federal court litigation concerning the Florida functional literacy test used to determine the award of high school diplomas, *Debra P. v. Turlington*,³ has been widely discussed and described in educational journals.⁴ However, other lawsuits have pursued quite different legal theories from those addressed by the courts considering the Florida challenge. The lawsuits concerning the use of minimum competency tests to determine diploma awards have ranged from state court challenges under state administrative procedures acts to state and federal court challenges under state or federal constitutional equal protection or due process theories, challenges under title VI of the Civil Rights Act of 1964,⁵ the Equal Educational Opportunities Act,⁶ section 504 of the Rehabilitation Act of 1973,⁷ and the Education for All Handicapped Children Act.⁸

While a number of lawsuits were filed in the early 1970's concerning the use of examinations to make decisions about teacher certification, hiring, salaries, and dismissal, these suits were of limited precedential value in determining the outcome of the student testing cases. The teacher competency test litigation filed to date has focused primarily upon use of state and federal equal protection clauses and upon title VII of the Civil Rights Act of 1964 which applies only to employment tests.⁹ Given the increased uses of teacher competency testing now being proposed, however, these cases assume renewed importance in assessing the potential for successful legal challenges to the new teacher testing programs.

3. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g en banc denied* 644 F.2d 397 (5th Cir. 1981), 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

4. See, *inter alia*, Benjes, Heubert, & O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 Harv. Civil Rights-Civil Liberties No. 3 (Winter 1980); *Education and the Law: Functional Literacy Program — a Matter of Timing*, *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), 10 Stetson L. Rev. 125-39 (1980); *Functional Literacy Testing and the Denial of High School Diplomas in a Post-Desegregation Setting: Debra P. v. Turlington*, 33 Rutgers L. Rev., 564-98 (1981); The Courts, Validity, and Minimum Competency Testing, (Madaus ed. 1983); Popham & Lindheim, *Implications of a Landmark Ruling on Florida's Minimum Competency Test*, 63 Phi Delta Kappan 18-20 (September 1981); A Paper prepared for the Education Commission of the States (October 15, 1979), Tractenberg, *Legal Implications of Minimum Competency Testing: Debra P. and Beyond*.

5. 42 U.S.C. § 2000d.

6. 20 U.S.C. § 1703.

7. 29 U.S.C. § 794.

8. 20 U.S.C. § 1401.

9. 42 U.S.C. § 2000e.

The balance of this chapter presents an examination of the legal theories asserted in the courts to date in lawsuits challenging minimum competency testing of teachers and students and will describe the extent to which those theories have been employed successfully by plaintiffs.

Student Competency Testing

State Administrative Procedures Act Challenges

The primary challenges presented to date concerning the implementation of a statewide minimum competency testing program used to determine the award of high school diplomas were filed against the testing program implemented in Florida as a result of the Florida Educational Accountability Act 1976.¹⁰ The Florida Accountability Act spawned a series of lawsuits, in both the state and federal courts, challenging the imposition of two new high school graduation requirements — a test of basic skills achievement and a demonstration of proficiency in functional literacy. The basic skills requirement became a one-time-only examination for high school students; those who failed the basic skills test (later termed the Florida Statewide Student Assessment Test I, or SSAT-I) were subjected to local school district mechanisms for determining whether basic skills proficiency had been achieved. The second requirement, as implemented by the Florida Department of Education, resulted in a second examination, the functional literacy test (or SSAT-II), which students had to retake until they passed. The first litigation addressing the Accountability Act challenged the procedure whereby the Florida State Board of Education established the passing score for determining successful performance on the basic skills test.¹¹

A state administrative hearing officer had determined that the scoring criteria for determining successful performance on Florida's high school basic skills test, which was used as part of the high school graduation requirement, was a "rule" under the terms of the Florida Administrative Procedures Act,¹² and that the state's failure to follow the Florida Administrative Procedures Act in establishing the passing score for the basic skills test required invalidation of the rule. On appeal to an intermediate state appellate court, the hearing officer was reversed on grounds, *inter alia*, that determination of whether a

10. Fla Stat. 229.57.

11. Florida State Board of Educ. v. Brady, 368 So. 2d 661 (Fla. Dist. Ct. App. 1979). In related litigation, the rules were upheld in the face of a due process challenge to the promulgation of the rules. Brady v. Turlington, 372 So. 2d 1164 (Fla. Dist. Ct. App. 1979).

12. Fla. Stat. 120.52 (14).

particular student will be considered to have met high school proficiency standards is an issue not intended by the legislature to be covered by the Administrative Procedures Act. Standard-setting, according to the court, is properly left to the State Commissioner of Education, to whom the legislature had in the Educational Accountability Act delegated authority to establish the criteria for high school graduation tests.¹³

Although not presented under a state administrative procedures act, related litigation in California challenged one local school district to meet a statutory requirement imposed in the state's minimum competency testing statute requiring citizen participation in each district's formulation of its minimum competency standards.¹⁴ The case was later settled after the school district agreed to set new proficiency standards according to the public participation requirements of the California statute.¹⁵

The challenges to competency testing requirements based upon narrow state administrative procedures acts or related statutory procedural challenges have had limited visibility and even more limited success. The problems attendant with such challenges are obvious. The lawsuits address fairly superficial procedural issues concerning the implementation of the testing requirements and do not address the underlying educational and public policy concerns some have raised about minimum competency test requirements. Finally, these types of challenges can all be easily overcome by the public officials administering the programs who can tinker with the mechanisms until the procedural flaws in the system are eliminated.

State or Federal Equal Protection Challenges

The more significant litigation concerning minimum competency testing of students has presented two primary sets of equal protec-

13. Brady, 368 So.2d at 662.

14. *Hernandez v. Board of Educ., Lynwood Unified School Dist.*, No. SCC 01531 (Cal. Sup. Ct. Los Angeles County, 1980). Later, a group of plaintiffs represented by the same legal counsel filed a new state court challenge as taxpayers protesting the state statutory provisions allowing each local school district to establish its own proficiency standards. *Barber v. Board of Educ. of the State of California*, No. C 340963, (Cal. Sup. Ct. Los Angeles County, 1980). This complaint alleged that the statutory scheme for local decision-making violated equal protection of the laws in creating a classification scheme where students could fail to meet the proficiency standards in one school district and be denied a regular high school diploma but might receive a diploma by another district in the state having met the same standards. Among the types of relief requested in the case was a declaratory judgment that only the state board of education could set proficiency standards for the state. The case was perhaps at least partially mooted out with the enactment in 1981 of Assembly Bill 1446, ch. 267, which created mandatory reciprocity between school districts so that persons passing a test in one district would not have to pass another test when they moved to a new district.

15. Cal. Educ. Code § 51215 (1980).

tion claims — those put forth on behalf of black students asserting that blacks are discriminated against in testing programs on the basis of race, and those claims brought on behalf of "every student,"¹⁶ asserting that testing programs fail to meet even basic rational relationship challenges. No court to date, however, has failed to find that the use of a minimum competency test to determine the award of high school diplomas bears a rational relationship to the legitimate state goal of fostering educational accountability. Successful equal protection challenges rested upon other theories or were asserted in conjunction with successful due process theories.

The impact of minimum competency tests upon black students was not altogether unexpected, given the history of student performance on most standardized measures of educational achievement. In fact, the results were perhaps more devastating for all youth, particularly black youth, than had been initially projected. For example, in the first administration of the functional literacy test in Florida in October 1977, 27% of the black students taking the test failed and 24% of the whites taking the test failed.¹⁷ In October 1978, functional literacy performance by black students compared to whites was such that black students had ten times greater failure rate than did whites.¹⁸ By 1983, test performance among Florida high school students on the functional literacy test had improved considerably.¹⁹ However, racial disproportions persisted. While 20% of the total student population was black, 57% of the students failing the functional literacy test were black.²⁰ Similar statistics have been presented concerning the local school districts minimum competency testing program in Tatnall County, Georgia. In Tatnall County in 1978, the district's students had an overall failure rate of 14% on the measure being used in the district as the minimum competency test (the California Achievement Test), with 57% of these failures being black.²¹ In 1979, 83% of the Tatnall County students failing the test were black and in 1980, 100% of the students failing the Tatnall County test were black,²² although the overall proportion of blacks in that school district's population was 30.8%.²³

16. Clague, *Competency Testing and Potential Constitutional Challenges of Every Student*, 28 Catholic U.L. Rev. 469 (1979).

17. 474 F. Supp. at 249.

18. *Id.*

19. 564 F. Supp. at 180.

20. *Id.* at 186.

21. *Johnson v. Sikes*, 730 F.2d 644, 645-46 (11th Cir. 1984).

22. *Id.*

23. *Anderson v. Banks* 520 F. Supp. 472, 478 (S.D. Ga. 1981), modified 540 F. Supp. 761 (S.D. Ga. 1982)

While the statistics indicating disparate impact of minimum competency testing requirements upon black students have been graphically clear, the extent to which past precedent would be useful in determining the race-based equal protection challenges was somewhat less clear. The issue has been addressed twice by the courts, in the *Debra P.* litigation in Florida and in the *Tatnall County* case.²⁴ In the first round of the litigation, the trial and then the appellate court deciding the case required a four year moratorium on the use of the test as a diploma sanction so that no students would be denied high school diplomas until all students had been a full twelve years of schooling in unitary school systems. The most recent decision in the *Debra P.* litigation adopts the standard first set forth in the *McNeal v. Tate* ability grouping case and holds that use of a test as a diploma sanction is permissible only where the state proves that either the disproportionate failure rate for blacks is not caused by the present effects of past intentional discrimination, or that the use of the test as a diploma sanction would remedy those effects.²⁵ The performance of black students on Florida's functional literacy test, although disproportionately low, was not found to be the result of past unlawful discrimination. Furthermore, the court determined, based upon expert testimony, that the diploma sanction would in fact work to remedy the vestiges of past intentional segregation by requiring students to pay closer attention to skills acquisition.²⁶

Due Process Challenges

While the lines in the competency testing lawsuits between equal protection and due process analyses become blurred as they do in many such cases, due process challenges to the use of competency tests also have been successfully asserted. The initial question presented under constitutional due process provisions addresses whether property or liberty interests could be identified on behalf of the students bringing the challenges. Both such interests have been recognized by the courts. The definition of the property interest at issue has changed slightly from case to case. In the landmark litigation in Florida, both the federal district court and the circuit court of appeals defined a property interest consisting of a student's expectation of receiving a regular high school diploma according to the

24. Equal protection challenges to racial disproportions were also asserted in *Iwanda H. v. Berry* No. 80-0156, (W.D.N.C. dismissed) a challenge to a North Carolina competency test requirement. The case was voluntarily dismissed after it was determined that very few students failed the test and that most of these were students who had been enrolled in special education programs.

25. 730 F.2d at 1414.

26. *Id.* at 1416.

original standards and requirements for that diploma set out when the student commenced his educational career.²⁷ In the Tatnall County case, the district court defined that interest more broadly, finding a property interest in receipt of a high school diploma.²⁸ However, in a challenge to the use of test data to determine grade promotion and class placement in the Tuscaloosa, Alabama school district which attempted to rely upon the standards set forth in *Debra P.* for defining the property interests at stake, some of the limits of the *Debra P.* holding were noted. In *Bester v. Tuscaloosa City Board of Education*,²⁹ the Eleventh Circuit declined to expand its *Debra P.* holding to recognize a property interest in grade promotion according to the standards which had originally been set out for students when those standards were later deemed to have been too low.³⁰

The liberty interest which has been found in the student competency testing cases has been identified on the basis of evidence indicating, as would be expected, that students who fail the competency test are stigmatized as a result of their poor test performance. In Florida, the trial court noted testimony that students who failed the test were perceived as "global failures."³¹

Once identification of the property and liberty interests at stake was completed, inquiry concerning the process due has focused on two different, albeit related, components of proper notice — time and substance. The courts have first raised questions about the sufficiency of warnings to students, educators, and parents of the impending new graduation requirements. They have next focused upon the instruction which must be offered in order to sufficiently prepare students to meet the new test requirement.

In calculating notice periods, the courts have looked not only at the time span between initial passage of new legislation requiring successful performance on a test and at the graduation day upon which diplomas will be denied, but also at the span of time between the point at which students and educators became aware of the specific skills and knowledge to be covered on the test and graduation day. In the Florida litigation, a thirteen month period between announcement of the skills and knowledge to be covered on the test and the first graduation day upon which the testing requirement would be imposed was found insufficient.³² However, a district court ad-

27. 474 F. Supp. at 266.

28. *Anderson v. Banks*, 520 F. Supp. 472, 504 (S.D. Ga. 1981).

29. 722 F.2d 1514 (11th Cir. 1984).

30. *Id.* at 1516.

31. 474 F. Supp. at 258.

32. 474 F. Supp. 244, *aff'd* 644 F.2d 397.

addressing a challenge to the Tatnall County program found a twenty-four month period of notice was sufficient.³³ While the precise formula for calculation of notice periods is not clear, the courts have apparently taken into consideration such factors as evidence regarding the nature of the test being used and the extent to which there is evidence that the schools were in the past affording instruction in the skills and knowledge covered on the test, a matter addressed more completely in their analysis of the instructional issue discussed below.

In the Tatnall County situation, in which a twenty-four month notice period was upheld, the test had been used in the district in the past and was a nationally-normed, standardized achievement test, the California Achievement Test (CAT). The Tatnall County graduation requirement imposed a standard whereby students had to achieve a grade equivalent of 9.0 on the CAT prior to graduation. In the Florida situation, however, a new, state-developed test was created under the statutory requirement. Further, a gubernatorial commission conducted hearings and received testimony around Florida prior to the implementation of the test sanction and reached the conclusion that the skills and knowledge covered on the test addressed materials that students "may or may not have been taught recently, well, or perhaps at all."³⁴ Here, the initial three-year phase-in of the test requirement originally contemplated by the 1976 act was postponed by court order and, in fact, it was not until the Spring of 1983 that diplomas were denied for the first time in Florida on the basis of student performance on the functional literacy test.³⁵

As an outgrowth of the time-of-notice requirement, the courts have imposed a substantive standard under which the burden of proof has been placed upon defendant educators to establish that, when a test is used as part of a diploma requirement, the test is a measure of skills and knowledge that students have been "actually taught."³⁶ This requirement, which served as part of the basis for a four-year moratorium on the use of Florida's functional literacy test as a diploma requirement in the years from 1979 to 1983, was later described by the Eleventh Circuit as a standard which could be met with inferential evidence of instruction and with evidence of the effectiveness of remedial programs offered in the schools.³⁷

The Seventh Circuit found that fourteenth amendment due pro-

33. 540 F. Supp. 765.

34. 474 F. Supp. at 266.

35. 730 F.2d 1405.

36. 644 F.2d at 405.

37. 730 F.2d at 1410-11.

cess requirements applied to the Peoria testing program, given the stigmatizing effect of test failure in that district. It held, under the due process clause, that students in need of special education should be given sufficient notice of a minimum competency testing requirement to enable them to have an adequate opportunity to prepare to meet that requirement. The court went on to find that, while the Peoria students had had notice of approximately one and a half years, this notice was insufficient because as much as 90% of the material covered on the district minimum competency test had not been included in the individualized educational programs (IEPs) formulated for the students.

Challenges by Students with Handicapping Conditions

Perhaps the most complex series of legal and policy issues concerning the use of student competency testing to determine the award of high school diplomas has been presented in cases concerning students with handicapping conditions who have been enrolled in special education programs. These students have presented challenges based upon the legal theories asserted on behalf of "every student," but have in addition presented challenges to the test requirements which arise out of the provisions of the federal statutes concerning the education of handicapped students, the Education for All Handicapped Children Act (EAHCA) and section 504 of the Rehabilitation Act of 1973. The EAHCA provides federal financial assistance to states for educational services to students with handicapping conditions in need of special education and attaches to the receipt of that federal aid both procedural and substantive requirements concerning the provision of special education services; that statute has at its heart a requirement that handicapped students in need of special education receive appropriate, individually-tailored educational services in the least restrictive educational environment. The second federal statute, section 504, bars discrimination on the basis of handicapping conditions in any programs or activities receiving federal financial assistance.

States and local school districts have varied considerably over the years in the graduation requirements they impose upon special education students and in the nature of the diploma or certificate awarded to those students upon completion of their educational careers. None of the approaches employed in the past have provided clear guidance for determining how to include special education students in the new minimum competency testing requirements, particularly where the nature and extent of that participation must be determined in light of the federal statutory requirements described above.

Court challenges to diploma requirements, such as the successful performance on minimum competency tests by handicapped students, have focused upon several different issues. An initial question was presented concerning the extent to which students with handicapping conditions should be subject to the competency test requirement at all. In addition, courts have addressed the issue of adequacy of preparation for the test for students with handicapping conditions and the issue of accommodation of special needs in the administration of the tests.

All courts addressing the matter to date have held that the use of minimum competency tests to determine the award of regular high school diplomas to students with handicapping conditions is not per se unconstitutional nor per se in violation of the federal statutes concerning education of the handicapped. In dicta, the early cases indicated that there may be situations in which the use of competency tests to determine diplomas awarded to students with handicapping conditions might be unconstitutional or in violation of the federal statutes. In fact, such was the decision reached, on the basis of the federal statutes, in a federal case arising out of the challenge to the Peoria, Illinois testing program.³⁸ The courts have concluded that there are some students who will be denied diplomas on the basis of the competency test requirement as a result of the nature of their handicapping conditions. These students would very well have received regular high school diplomas before the test requirement was added.³⁹

The Tatnall County, Georgia case involved a challenge to the test requirement on grounds that the testing program violated section 504 because students with certain kinds of handicapping conditions, particularly mental retardation, would not ever receive a diploma under the program. The argument of the students was that, given the nature of their handicapping conditions, some of them would never be able to pass a minimum competency test and would as a result never receive regular high school diplomas. The district court ruled that section 504 does not require the award of diplomas to handicapped students unable to meet the proficiency standards included in the minimum competency test. In so ruling, the court referred to the section 504 regulations, which suggest that different standards for students with handicapping conditions could be appropriate on the theory that they are "not otherwise qualified" to receive diplo-

38. *Brookhart v. Peoria School Dist.*, 687, F.2d 182 (7th Cir. 1982).

39. *Board of Educ. of Northport-East Northport v. Ambach*, 436 N.Y.S. 2d 564, 567 (N.Y. Sup. Ct. 1981), *rev'd* 458 N.Y.S. 2d 680 (N.Y. App. Div. 1982), *aff'd*, 469 N.Y.S. 2d 669 (N.Y. 1983).

mas.⁴⁰ Section 504, in its statutory language, bars discrimination against "otherwise qualified" persons with handicapping conditions: "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Note, however, that the implementing regulations for section 504 provide that "qualified handicapped person" means, for public elementary or secondary education, "a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under [the EAHCA]."⁴¹ It appears, therefore, that a viable issue concerning the court's interpretation of section 504 might have been presented on appeal. No such issue on appeal was, however, raised.

The Seventh Circuit Court of Appeals, in a challenge to the Peoria testing program, held that the use of a minimum competency test to determine diploma awards to students with handicapping conditions does not constitute discrimination in violation of section 504. The challenge presented in the Peoria case rested upon the theory that the use of a minimum competency test to determine the award of high school diplomas constituted the use of a single procedure as a sole criterion for determining appropriate educational programs. Section 504 prohibits the use of a single test instrument to make decisions about the appropriate education for a handicapped student. The Seventh Circuit found that, since graduation requirements in the school district included not only successful completion of the test but also course and credit requirements, the test was not being used as the sole criterion for determining graduation.⁴² A second section 504 challenge to the Peoria requirement asserted that students with handicapping conditions were entitled, under the federal statute, to an alteration in the content of the minimum competency test to accommodate the abilities of the students. Given the Seventh Circuit's interpretation of the "otherwise qualified" language in the statute, this assertion also failed. The Seventh Circuit did, however, require that accommodations of the administration of the examination be made for students otherwise qualified to successfully compete on the test. Such accommodations would not alter the content of the

40. 34 C.F.R. § 104.3(k)(2).

41. 34 C.F.R. § 104.35(b)(2).

42. 697 F.2d 182 (7th Cir. 1982).

test but would offer accommodations in the administration of the test to students with handicapping conditions.⁴³

Teacher Competency Testing

In the near future, it is probable that attention will focus not on student competency testing, but rather upon the use of competency tests to make critical determinations about teachers and candidates for teaching certificates. The current widespread popularity of proposals to foster excellence in public education will increase the possibilities of litigation given the punitive focus of many of the proposals, particularly those concerning educational personnel. The flurry of litigation concerning teacher testing, particularly cases in the early 1970's on the use of the National Teachers Examination, subsided substantially in the latter part of that decade, due in large part to the United States Supreme Court decision in *Washington v. Davis*, with its refusal to apply strict title VII standards to a police examination, and the resultant deferral to an equal protection analysis under which an intent standard was imposed.⁴⁴ This was followed by the Supreme Court's summary affirmance of the decision entered below in *United States v. South Carolina*, in which the National Teachers Examination was held to have been sufficiently validated for its use with teachers in that state to make salary and certification decisions.⁴⁵ In the early teacher testing cases where teachers achieved occasional victories, such as the decision in a Georgia case in which use of the NTE was found to violate even a rational basis standard under the equal protection clause,⁴⁶ the litigation in which teachers were most likely to succeed was litigation brought as a part of, or in conjunction with, school desegregation cases in which the teachers could establish that teacher test requirements worked to frustrate attempts to implement court-ordered desegregation of school faculties.⁴⁷ Teachers also have at times been able to establish that imposition of an NTE requirement arose from a discriminatory intent.⁴⁸

Recent decisions indicate, however, that a new era may be dawning in judicial scrutiny of teacher testing practices. An August 1983 decision in a case challenging the Mobile County, Alabama school system's use of the NTE awarded a preliminary injunction against the use of the test to determine teacher dismissal when the cut-off

43. *Id.*

44. 426 U.S. 229 (1977).

45. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1977).

46. *Georgia Ass'n of Educators v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976).

47. *Baker v. Columbus Municipal Sep. School Dist.* 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

score on the test excluded a disproportionate number of black teachers. The Alabama court enjoined the use of the NTE largely on grounds that the Educational Testing Service, developer and marketer of the NTE, did not approve of the Mobile district's use of the test.⁴⁹ In another recent case, a court-approved settlement in July 1983 ended a North Carolina challenge to the use of the NTE as a teacher certification requirement; under the agreement, North Carolina will provide remedial assistance to individuals failing the test.⁴⁹

A new legal challenge to a teacher competency testing program was initiated as recently as this past month. Members of the Arkansas Education Association filed a state court challenge asserting that a recent statute requiring successful performance on a state-developed teacher competency test in order to obtain renewal of certification violates the terms of the state equal protection clause.⁵¹ The challenge does not address the potential civil rights problems inherent in the Arkansas scheme, but instead poses a simple facial challenge to the provisions of the statute, which provides that the teacher competency test will be given only once (Spring 1985), and will only be required of certified educators then employed in Arkansas public schools. That group of educators will face the potential loss of their certificate while new educators, or those who were not working in the Arkansas public schools during the 1984-85 school year, will be exempt from the testing requirement.

Given the increased interest in the use of teacher competency tests, further litigation can be expected. In addition to the equal protection challenges presented, it is probably that, once the results of the new tests are in, civil rights challenges may be appropriate. It is possible that these future court cases may take a different turn than did the previous challenges to the use of the NTE, which is the property of the most sophisticated testing corporation in the world. Many of the new teacher competency tests are being developed at the state or local level or by private testing companies, where expertise and resources are often less available. Many of the new tests are also being developed under incredible time constraints, with the policy-makers who mandate the tests allowing the test-makers very little time to ensure the validity and reliability of the tests. Finally, the civil rights issues presented in any new court challenges may well be quite different than those presented previously. In many of the jurisdictions in which teacher tests are being used, there has been a

49. *York v. Alabama State Bd. of Educ.*, 518 F. Supp. 779 (M.D. Ala. 1983).

50. See Lines, *supra* note 2, at 5

51. *Stanfield v. Turnbow*, No. 84-4892, (Ark. Chancery Ct., Pulaski County 1984).

long history of desegregation efforts. While many of these efforts have clearly been unsuccessful or have had mixed or limited success, the links between the teacher test and unlawful discriminatory purposes will be harder to establish as a matter of law although it is well to note that many of the educators who are now having difficulty on the tests were schoolchildren in the years before desegregation or during the era — which continues to the present day — in which the nation's public schools and universities are still struggling to eliminate racial discrimination in the educational process.

Conclusion

There are a large number of states that are now beginning to deny diplomas on the basis of student test performance. No new lawsuits have been filed by students recently, although serious expressions of concern have been raised about such programs as the one in Texas, where there are large groups of minority and limited-English-proficient students who can expect to be seriously disadvantaged by the test requirement. Perhaps more likely in the near future are suits brought by teachers against the teacher test requirements. The outcome of any such suits is highly uncertain given the wide variation in past precedents.